

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

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1 HUBEL, Magistrate Judge:

2 Plaintiff Tom Daffron filed this action against the
3 Commissioner seeking review of the denial of his applications for
4 Disability Insurance Benefits (DIB) and Supplemental Security
5 Income (SSI). Defendant moves to dismiss the Complaint for lack of
6 subject matter jurisdiction based on plaintiff's failure to exhaust
7 administrative remedies. I recommend that defendant's motion be
8 granted.

9 BACKGROUND

10 After proceeding through the initial stages of the DIB and SSI
11 application process, plaintiff requested a hearing before an
12 administrative law judge (ALJ). Exh. 1 to Ray Declr. On October
13 3, 2005, ALJ Charles Evans issued a Notice of Hearing addressed to
14 plaintiff at 204 S.W. 8th #610, Portland, Oregon 97205. Exh. 2 to
15 Ray Declr. The notice informed plaintiff that his hearing was set
16 for Friday, November 18, 2005, at 2:30 p.m. Id. Plaintiff did not
17 appear at the hearing. Ray Declr. at ¶ 3b.

18 On December 21, 2005, the ALJ issued an order dismissing
19 plaintiff's request for hearing because plaintiff failed to appear
20 at the November 18, 2005 hearing and failed to respond to a
21 November 29, 2005 Notice to Show Cause for Failure to Appear. Exh.
22 3 to Ray Declr.

23 On December 29, 2005, plaintiff filed a Request for Review of
24 Hearing Decision with a Good Cause Statement. Exh. 4 to Ray Declr.
25 In the Good Cause Statement, plaintiff's counsel explained that
26 plaintiff did not receive the October 3, 2005 Notice of Hearing
27 because plaintiff had moved from his residence and the Office of
28 Hearings and Appeals did not have plaintiff's current address. Id.

1 Plaintiff's counsel stated that plaintiff moved twice since the
2 time he had requested a hearing in January 2004. Id. Plaintiff's
3 counsel then explained that plaintiff's address changes had not
4 been communicated to Social Security until plaintiff called them in
5 late November 2005. Id. Plaintiff's counsel asserted that during
6 this phone call, plaintiff was told that his claim was still open.
7 Id. Plaintiff's counsel states that plaintiff was not told that a
8 hearing had previously been scheduled and that he had since been
9 required to provide a good cause letter for not attending. Id.

10 On February 6, 2006, the Appeals Council denied plaintiff's
11 request for review. Exh. 5 to Ray Declr. Plaintiff then filed
12 this action.

13 STANDARDS

14 A motion to dismiss brought pursuant to Federal Rule of Civil
15 Procedure 12(b)(1) addresses the court's subject matter
16 jurisdiction. The party asserting jurisdiction bears the burden of
17 proving that the court has subject matter jurisdiction over his
18 claims. Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375,
19 377 (1994).

20 A Rule 12(b)(1) motion may attack the substance of the
21 complaint's jurisdictional allegations even though the allegations
22 are formally sufficient. St. Clair v. City of Chico, 880 F.2d 199,
23 201 (9th Cir. 1989). The court may consider evidence outside the
24 pleadings to resolve factual disputes. Id.; see also Dreier v.
25 United States, 106 F.3d 844, 847 (9th Cir. 1996) (a challenge to
26 the court's subject matter jurisdiction under Rule 12(b)(1) may
27 rely on affidavits or any other evidence properly before the
28 court).

1 DISCUSSION
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Under the Social Security Act, judicial review is limited to "final decision[s] of the Commissioner of Social Security made after a hearing" 42 U.S.C. § 405(g). The statute further provides that "[n]o . . . decision of the Commissioner of Social Security shall be reviewed by any person, tribunal, or governmental agency except as herein provided." 42 U.S.C. § 405(h).

As explained by the Ninth Circuit, "[t]he Supreme Court has stated that § 405(g) 'clearly limits judicial review to a particular type of agency action, a "final decision of the Secretary made after a hearing.'" Califano v. Sanders, 430 U.S. 99, 108, 99 S. Ct. 980, 51 L.Ed. 2d 192 (1977) (emphasis added) (quoting 42 U.S.C. § 405(g))." Subia v. Commissioner, 264 F.3d 899, 902 (9th Cir. 2001). Without a hearing or final decision by the Commissioner, the claimant "fail[s] to exhaust the administrative remedy upon which judicial review depends." Hoye v. Sullivan, 985 F.2d 990, 991 (9th Cir. 1992).

In Hoye, the claimant failed to appear for his scheduled hearing. He was notified of the hearing, but refused to attend because he alleged that the ALJ who had been assigned the case was prejudiced against his attorney. Id. The court explained that by refusing to attend, the claimant waived his opportunity for a hearing and thus, failed to exhaust his administrative remedies which then precluded judicial review. Id.

Hoye recognized that the failure to exhaust could be waived by the assertion of a colorable constitutional claim, including the denial of due process. Id.; see also Subia, 264 F.3d at 902 (claimant's failure to exhaust administrative remedies may be

1 waived and judicial review granted upon assertion of colorable
 2 constitutional claims). Here, plaintiff alleges that he has a
 3 colorable constitutional claim because he never received the Notice
 4 of Hearing and a basic principle of the Due Process Clause
 5 guarantees him the right to notice and the opportunity to be heard.
 6 Pltf's Mem. at p. 2.

7 Although it is "axiomatic that due process requires that a
 8 claimant receive meaningful notice and an opportunity to be heard
 9 before his claim for disability benefits may be denied[,]'" Udd v.
 10 Massanari, 245 F.3d 1096, 1099 (9th Cir. 2001), "[t]he mere
 11 allegation of a [] due process violation is not sufficient to raise
 12 a 'colorable' constitutional claim to provide subject matter
 13 jurisdiction." Hoye, 985 F.2d at 992.

14 The pertinent social security regulations require the
 15 Commissioner to provide the notice of hearing to a claimant at the
 16 claimant's "last known address." 20 C.F.R. § 404.938(a); 20 C.F.R.
 17 § 416.1438(a). Here, the record establishes that the Commissioner
 18 sent the hearing notice to plaintiff's last known address.
 19 Plaintiff does not dispute that the notice was sent to the last
 20 address provided by him to the Commissioner.

21 In contrast to Udd, where the claimant demonstrated that he
 22 lacked the mental capacity to understand the notice sent to him,
 23 plaintiff here alleges no infirmity or incapacity in his ability to
 24 provide the Commissioner with a current address, in his ability to
 25 understand the notice, or in his ability to physically present
 26 himself at the hearing location. Thus, the Commissioner provided
 27 constitutionally adequate notice and an opportunity to be heard.

28 Accordingly, plaintiff fails to assert a colorable due process

1 claim and his failure to exhaust his administrative remedies should
2 not be waived.

3 CONCLUSION

4 I recommend that the Commissioner's motion to dismiss (#7) be
5 granted.

6 SCHEDULING ORDER

7 The above Findings and Recommendation will be referred to a
8 United States District Judge for review. Objections, if any, are
9 due July 14, 2006. If no objections are filed, review of the
10 Findings and Recommendation will go under advisement on that date.

11 If objections are filed, a response to the objections is due
12 July 28, 2006, and the review of the Findings and Recommendation
13 will go under advisement on that date.

14 IT IS SO ORDERED.

15 Dated this 29th day of June, 2006.

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18 /s/ Dennis James Hubel
19 Dennis James Hubel
United States Magistrate Judge
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